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Nos. 89-379, 89-5497, 89-5512, and 89-5601

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES COONAN AND EDNA COONAN, PETITIONERS

v.

UNITED STATES OF AMERICA

RICHARD RITTER, PETITIONER

v

UNITED STATES OF AMERICA

WILLIAM BOKUN, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES MCELROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the co-conspirator exception to the hearsay rule applies when the conspiracy alleged is a conspiracy to violate the racketeering laws (89-379 Pet. 26-39; 89-5601 Pet. 10-13).

2. Whether the district court properly instructed the jury on the requisite nexus between the RICO enterprise and the predicate acts of racketeering (89-379 Pet. 40-45; 89-5601 Pet. 17-23).

3. Whether the district court properly denied the motions of petitioners James Coonan, Edna Coonan, and Richard Ritter to suppress evidence seized pursuant to search warrants (89-379 Pet. 46-54; 89-5497 Pet. 9-14).

4. Whether the district court properly refused to sever the trial of Edna Coonan (89-379 Pet. 54-55).

5. Whether the district court properly excluded expert testimony concerning the psychiatric condition of a government witness (89-379 Pet. 56-62; 89-5512 Pet. 27-36; 89-5601 Pet. 13-16).

6. Whether the district court improperly restricted petitioner Bokun's direct examination of a government witness (89-5512 Pet. 13-26).

7. Whether petitioner Bokun was denied his rights to counsel and to a fair trial when his attorney fell ill eight weeks into a five-month trial, and the district court appointed an attorney to represent Bokun during his regular counsel's absence (89-5512 Pet. 37-49).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 876 F.2d 891 (Table).[1]

[1] "Pet. App." refers to the appendix to the petition in No. 89-379.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1989. Petitions for rehearing were denied on July 5, 1989 (Pet. App. 14a-15a). The petition for a writ of certiorari in No. 89-5497 was filed on September 1, 1989; the petition in No. 89-379 was filed on September 2, 1989; and the petitions in Nos. 89-5512 and 89-5601 were filed on September 5, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of participating in and conspiring to participate in the affairs of a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d), as well as various substantive crimes corresponding to the racketeering acts.[2] James Coonan was sentenced to 75 years' imprisonment and

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[2] All petitioners were convicted of the RICO charges. In addition, all but Bokun were convicted of conspiracy to make extortionate extensions of credit, in violation of 18 U.S.C. 892, and conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894. James Coonan and McElroy were also convicted of attempted murder and assault, in violation of 18 U.S.C. 1952B (Supp. V 1987); conspiracy to commit murder, in violation of 18 U.S.C. 1952B (Supp. V 1987); and conspiracy to commit extortion against the International Brotherhood of Teamsters and the International Longshoremen's Association, in violation of 18 U.S.C. 1951. James Coonan and Edna Coonan were convicted of conspiring to evade income taxes, in violation of 18 U.S.C. 371, and James Coonan was also convicted of financing extortionate extensions of credit, in violation of 18 U.S.C. 893. Finally, Ritter and Bokun were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846.

a $1 million fine; Edna Coonan was sentenced to 15 years' imprisonment and a $200,000 fine; McElroy was sentenced to 60 years' imprisonment; Ritter was sentenced to 40 years' imprisonment; and Bokun was sentenced to 50 years' imprisonment.

1. The charges against petitioners stemmed from their involvement in the "Westies," an organized crime group that controlled criminal activities in the Hell's Kitchen section of New York City for a 20-year period beginning in the mid-1960's. Members of the Westies terrorized and exploited the community through a series of murders and a variety of illegal schemes involving kidnapping, extortion, loansharking, gambling, and drug distribution. In three especially brutal murders, the bodies of the Westies' victims were dismembered and dumped into the East River. Additionally, the Westies were involved in schemes to extort money and jobs from labor unions doing business in Hell's Kitchen. Gov't C.A. Br. 5-6.

James Coonan supervised the gang's activities and received most of its criminal proceeds. During Coonan's incarceration in the 1960's and 1970's on a murder conviction, his wife Edna managed the gang's loansharking operation and relayed important messages from Coonan to his subordinates, including Coonan's instructions to murder a union official who was skimming money from the Westies. McElroy was one of Coonan's chief enforcers, and in that capacity he committed murder, loansharking, and extortion. Bokun also committed murder for the gang and operated a substantial cocaine business. Ritter distributed large amounts of cocaine and engaged in numerous loansharking transactions. Gov't C.A. Br. 6-7.

2. The court of appeals affirmed petitioners' convictions in an unpublished opinion. Pet. App. 1a-13a. The court explicitly considered and rejected most of the claims petitioners have raised in this Court; as to the remaining claims, the

court of appeals explained that it had "carefully considered the other arguments raised by [petitioners]" but had found them to be without merit. *Id.* at 13a.

ARGUMENT

1. a. Petitioners James Coonan, Edna Coonan, and McElroy contend (89-379 Pet. 26-39; 89-5601 Pet. 10-13) that the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) should not apply to racketeering conspiracies. According to petitioners, application of the co-conspirator exception is fundamentally unfair in a RICO conspiracy because such a charge is broader than a traditional conspiracy and can involve highly diverse crimes by apparently unrelated individuals. That contention is meritless.

The co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) applies by its terms to all conspiracies, regardless of their objects, size, or scope. Moreover, the courts have routinely applied the co-conspirator rule in RICO cases. See, *e.g.*, *United States* v. *Ruggiero*, 726 F.2d 913, 923-924 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Lemm*, 680 F.2d 1193, 1204 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Calabrese*, 645 F.2d 1379, 1386 (10th Cir.), cert. denied, 451 U.S. 1018 (1981). See also *United States* v. *Hewes*, 729 F.2d 1302, 1313 (11th Cir. 1984) (rejecting the claim that Rule 801(d)(2)(E) should be inapplicable to RICO cases), cert. denied, 469 U.S. 1110 (1985). There is no reason, in the context of RICO prosecutions, to depart from this Court's holding in *Bourjaily* v. *United States*, 483 U.S. 171, 182-184 (1987), that a court need not make an independent inquiry into the reliability of co-conspirator statements that are otherwise admissible under Rule 801(d)(2)(E). Although petitioners contend (89-379 Pet. 33-34) that RICO con-

spirators will not "know[ ] anything of the goals, much less the workings, of all predicate conduct" in the conspiracy, the same claim could be made about any other multiple-object conspiracy.[3]

b. Petitioner McElroy contends (89-5601 Pet. 6-10) that tape-recorded statements made by his girlfriend, Fran Mostyn, on January 15, 1987, to an undercover agent, in which she implicated McElroy in a prior Westies' killing, were improperly admitted under Rule 801(d)(2)(E). He asserts that Mostyn was not a conspirator, and that the statements were not made in furtherance of the racketeering conspiracy.

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[3] Petitioners contend (89-379 Pet. 36-39; 89-5601 Pet. 11) that the decision below conflicts with *United States* v. *Angiulo*, 847 F.2d 956 (1st Cir.), cert. denied, 109 S. Ct. 138 (1988). The court of appeals in that case expressed concern about an instruction that allowed the jury to consider co-conspirator statements in connection not only with the RICO counts, but also with an obstruction of justice count to which they were not relevant. The court nonetheless concluded that the error, if any, in failing to give a limiting instruction did not harm the defendant. 847 F.2d at 971-972. In the present case, petitioners at trial did not request a limiting instruction as to the use to which co-conspirator statements could be put, and they have therefore not preserved that issue. In any event, no such limiting instruction was required. All of the non-RICO offenses on which petitioners were convicted were also charged as predicate racketeering acts under the RICO counts. Since a defendant is liable for all offenses committed by any co-conspirator during the course of, and in furtherance of, a conspiracy in which both are members (*Pinkerton* v. *United States*, 328 U.S. 640, 645 (1946); *Angiulo*, 847 F.2d at 969-970), any evidence that was admissible to prove that petitioners were members of the RICO conspiracy was also relevant and admissible to show their liability on the offenses that were committed as predicate acts in furtherance of the RICO conspiracy, as charged in the indictment. In such circumstances, as the *Angiulo* court noted (*id.* at 972 n.20), a district court may instruct the jury that co-conspirator statements are admissible to prove the RICO and other offenses charged as predicate acts under the RICO counts.

On January 15, 1987, several weeks after McElroy was arrested on a murder charge, Fran Mostyn met with Westie member William Beattie and undercover police officer Ronald Stripp to discuss amphetamine sales and a contract murder that McElroy had offered to commit for Stripp. The conversation was tape-recorded. Mostyn responded to reservations expressed by Stripp about McElroy by saying that the murder case against McElroy was weak, that McElroy was a reliable and hard-working member of the Westies, and that his most recent accomplishment was the shooting of a union official. Gov't C.A. Br. 73-74.

The district court correctly found (see Gov't C.A. Br. 78) that Mostyn was a member of the RICO conspiracy and that her statements were made in furtherance of the conspiracy. The evidence showed that Mostyn provided substantial assistance to McElroy in his dealings with Westie members. She attended several conspiratorial meetings; she sold thousands of amphetamine pills on McElroy's behalf; and, as McElroy's agent, she negotiated for the commission of a contract murder by the Westies. Moreover, Mostyn's statements furthered the conspiracy by reassuring Beattie and Stripp that McElroy was a valuable member of the Westies and that he would soon be available for criminal activity. The statements also apprised Stripp—purportedly a newcomer to the Westies—of McElroy's high-ranking position within the enterprise. *Id.* at 79-80.

2. Petitioners James Coonan, Edna Coonan, and McElroy (89-379 Pet. 40-45; 89-5601 Pet. 17-23) contend that the district court failed to instruct the jury properly on the required nexus between the racketeering acts and the enterprise. The court of appeals correctly rejected that claim.

The RICO statute makes it a crime for a person associated with an enterprise whose activities affect commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering

activity * * *." 18 U.S.C. 1962(c). To establish the required nexus between a RICO enterprise and the predicate acts of racketeering, the government must show either that the defendant was "enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise" or that "the predicate offenses are related to the activities of that enterprise." *United States* v. *Robilotto*, 828 F.2d 940, 947-948 (2d Cir. 1987) (emphasis omitted), cert. denied, 484 U.S. 1011 (1988). Accord *United States* v. *Jannotti*, 729 F.2d 213, 226 (3d Cir.), cert. denied, 469 U.S. 880 (1984).

The district court's instructions here clearly fell within those standards. The court instructed the jury that the required nexus between the RICO enterprise and the acts of racketeering could be established if "either the act was committed by the defendant you are considering for the knowing and willful purpose of furthering the enterprise, or, in committing it, he knowingly and willfully availed himself of the resources of the enterprise." The court further instructed the jury that the Westies' "reputation for violence" was one alleged resource of the enterprise of which a defendant could have availed himself. Gov't C.A. Br. 153.

Petitioners nonetheless complain (89-379 Pet. 44; 89-5601 Pet. 20-21) that the instruction was deficient because the "resource" in question—the enterprise's reputation for violence—was freely available to anyone, whether or not associated with the enterprise. For that reason, McElroy contends (89-5601 Pet. 20-21) that "the charge given allowed findings that an act was 'related to the affairs of the enterprise' where an individual may in fact have had no verifiable support at all from the enterprise (such as money, weapons, personnel, etc.), but rather merely helped himself to the 'Westies' name to commit an independent, 'personal' crime."

That contention is incorrect. The trial court instructed the jury that a person who invoked the enterprise's reputa-

tion for violence solely in order to commit an independent personal crime was not culpable under RICO. As the trial court put it: "[T]he mere fact that you may have decided that there is an enterprise and that a given defendant was associated with it, does not establish that a particular crime he may have committed was related to the enterprise. In other words, a person does not sell his soul to the enterprise by becoming associated with it, but he continues to be free to commit good acts or bad acts on his own." Gov't C.A. Br. 153.

3. Petitioners James Coonan, Edna Coonan, and Richard Ritter (89-379 Pet. 46-54; 89-5497 Pet. 9-14) challenge certain searches conducted during the investigation. The Coonans contend that the affidavits supporting the search warrants did not establish probable cause that the evidence sought would be found at the locations named (89-379 Pet. 46-48), and that the warrants were overly broad. Petitioner Ritter claims that the evidence recited in the affidavit supporting the search warrant for his house was stale, and that the agent who prepared the affidavit intentionally misled the magistrate about the staleness of the evidence. Accordingly, he reasons, the good-faith exception to the exclusionary rule does not apply.

a. On June 23, 1986, federal agents executed a search warrant for the Coonans' residence in New Jersey. The warrant authorized the agents to search for:

> evidence of loansharking and extortion records (including the names of victims, collectors, partners, and/or bankers, and the amounts and interest due, collected, and/or paid), means or equipment/tools of collection, and proceeds; and other evidence of violations of 18 U.S.C. 1962(c) (including predicate acts of loansharking and extortion) and the fruits thereof.

The agents seized approximately five cartons of documents from that residence. Two days later, agents

executed a search warrant for a safe deposit box maintained by the Coonans at a local bank. The warrant authorized a search for essentially the same list of evidence. Agents seized several financial records from the box. Gov't C.A. Br. 123-124.

The warrant authorizing the search of the Coonans' residence was supported by the affidavits of Detectives Frank Pergola and Stephan Mshar of the New York City Police Department. The warrant authorizing the search of the Coonans' safe deposit box was supported by the same two affidavits, as well as by the affidavit of Detective Harry Brady. The Mshar affidavit, relying on three confidential sources, described the criminal enterprise known as the Westies and detailed some of the group's illegal activities over a 10-year period. Among other things, the affidavit stated that James Coonan was the leader of the Westies gang and that any money made by the group flowed to him. The affidavit further recited that Edna Coonan and Richard Ritter were gang members, and it described in detail the Westies' loansharking and extortion operation, including a list of Coonan's loansharking partners and customers. The affidavit recited that loansharking proceeds had been turned over to Coonan as recently as May and June 1986. Gov't C.A. Br. 124-127.

The Pergola affidavit recited a statement by Detective Mshar that, based on his experience in undercover narcotics investigations, he believed that narcotics traffickers generally keep records of sales and distributions in secure locations to which they have ready access, such as their homes. It also contained statements by two FBI agents that loansharks make and maintain records of their illegal activities in much the same way as narcotics traffickers do. Gov't C.A. Br. 129.

The Brady affidavit recounted the results of the search of the Coonans' residence, from which financial records, bank statements for 12 bank accounts, and two keys and

the receipt to a safe deposit box had been seized. The Brady affidavit also set forth the expert opinions of the two FBI agents that loansharks generally keep loansharking records in secure places within their residences or in safe deposit boxes to hide them from law enforcement agents. Gov't C.A. Br. 129-130.

b. There was ample probable cause to believe that evidence of loansharking activity would be found at the Coonans' residence and in their safe deposit box. The Mshar affidavit demonstrated that Coonan was the boss of the Westies' loansharking and extortion activities and that Edna Coonan served as her husband's helper. The affidavit also showed that Coonan was the personal repository of the Westies' loansharking loot. Moreover, two FBI agents, based on their training and experience in loansharking and extortion investigations, stated what common sense confirms—that loansharks generally maintain business records of their criminal activities and ill-gotten gains, just as narcotics traffickers do, and that those records are often kept within their residences or in other secure places, such as safe deposit boxes. Those showings amply supported the search of the Coonans' home and safe deposit box. See *United States* v. *Cruz*, 785 F.2d 399, 405-406 (2d Cir. 1986); *United States* v. *Fama*, 758 F.2d 834, 838 (2d Cir. 1985); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970).

The search warrants were not insufficiently particular. The particularity requirement of the Fourth Amendment is satisfied when the description of the objects of the warrant "enables the searcher to reasonably ascertain and identify the things authorized to be seized." *United States* v. *Wuagneux*, 683 F.2d 1343, 1348 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). Here, the warrants authorized a search for evidence of loansharking and extortion records, and they contained a list of items described as specifically as possible, such as records containing "names of victims,

collectors, partners, and/or bankers, and the amounts and interest due, collected, and/or paid." Gov't C.A. Br. 123. The fact that the warrants concluded with language authorizing a search for "other evidence of violations of 18 U.S.C. § 1962(c)" did not make the warrants overly broad; rather, as this Court has held, such general language at the end of a warrant must be read as restricted to the specific offenses itemized in the warrant. *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976) (upholding a warrant authorizing a search for particularly described documents "together with other fruits, instrumentalities and evidence of crime at this [time] unknown"). See also *United States* v. *Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986) ("general language located at the end of a warrant is to be viewed as relating only to the specific offense named in preceding portions of the warrant"); *United States* v. *Young*, 745 F.2d 733, 759 (2d Cir. 1984) ("the boilerplate ['other evidence'] language * * * followed a list of more specific items to be seized, and could be construed only in conjunction with that list"), cert. denied, 470 U.S. 1084 (1985).[4]

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[4] Petitioners allege (89-379 Pet. 49-50 & n.18) that the court of appeals' conclusion that the warrant was not overbroad conflicts with decisions of several other circuits. The cases relied upon by petitioners do not support that claim. In *United States* v. *Leary*, 846 F.2d 592, 601-604 (10th Cir. 1988), the warrant in question authorized a search for numerous listed documents "and other records and communications relating to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act." *Id.* at 594. Thus, the warrant entitled the agents to seize essentially all documents that the agents thought might help to prove the violation of particular export statutes. The warrant was too broad because it permitted the agents to exercise a legal judgment as to what, if anything, constituted a violation of the statutes. In holding that the warrant was overly broad, however, the *Leary* court emphasized that "it is not the mere reference to the statute that makes the * * * warrant overbroad, it is the *absence of any limiting features*" (*id.* at 601 n.15). Similarly, in *United States* v. *Roche*, 614

c. On June 20, 1986, agents executed a warrant to search Ritter's residence for, *inter alia*, cocaine, firearms, and stolen art work. Pursuant to the warrant, agents seized narcotics residue, dilutents, narcotics paraphernalia, and an automatic handgun and ammunition. In addition to the information contained in the Mshar and Pergola affidavits, the affidavits submitted in support of the Ritter warrant detailed Ritter's long-standing association with the Westies. For example, the affidavits recited that three confidential sources disclosed that Ritter was at the time, and for years had been, a Westies crew member; that Coonan had arranged to murder someone in 1978 as a favor to Ritter; and that in connection with the Westies' ongoing narcotics distribution operation, Ritter had purchased a quantity of cocaine on consignment from a fellow Westie on April 4, 1979. Gov't C.A. Br. 146-147.

The Mshar affidavit provided further evidence of Ritter's involvement with firearms. It stated that on an unspecified date one of the confidential sources had seen a cache of weapons, narcotics, and stolen property at Ritter's residence; that within the past two years Ritter had sold a fellow Westie an "untraceable" shotgun; and that when Ritter was arrested in 1978, he had thrown away a .22 calibre Derringer. Finally, the Brady affidavit described a June 17, 1986, interview with one of the confidential sources, in which the source had stated that Ritter's current residence was the same as the one in which the source had previously seen the cache of

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F.2d 6, 7 (1st Cir. 1980), *United States* v. *Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982), and *Rickert* v. *Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987), the only limitation on the items to be seized was the requirement that the items be evidence of violations of specific statutes. In the present case, by contrast, the warrant specifically described the types of evidence for which the agents were to search, and it did not leave to their unfettered discretion the task of determining what evidence constituted a violation of the statute in question.

weapons, and that Ritter was listed on the building directory as "Mr. Rogers." The affidavit recited that Detective Mshar had confirmed that information by visiting the building on June 19, 1986, and noting the name "Rogers" on the bell for Ritter's apartment. Gov't C.A. Br. 147.

The district court denied Ritter's motion to suppress the evidence seized from his residence. In rejecting Ritter's motion, the court declined to resolve the question whether there was probable cause to conduct the search. Rather, relying on *United States* v. *Leon*, 468 U.S. 897 (1984), the court admitted the seized evidence because of the searching agents' good faith reliance on the validity of the warrant. Gov't C.A. Br. 145-146.

d. Ritter claims, as he did below, that the agents deliberately misled the magistrate by concealing the fact that some of the information in the warrant was stale. The court of appeals examined the record on that point and found "nothing to suggest that the alleged omissions were intended to mislead the magistrate." Pet. App. 8a. As the court noted (*ibid.*), "the officers provided the magistrate with a wealth of information concerning Ritter's ongoing participation in the Westies." Those conclusions, affirming the findings of the trial court, warrant no further review.

4. Claiming that there was a prejudicial spillover of evidence, petitioner Edna Coonan argues (89-379 Pet. 54-55) that the district court committed reversible error in refusing to sever her trial from that of her husband. In fact, however, there was no prejudicial spillover; the evidence against James Coonan was readily segregable from the evidence against Edna, and the jury could easily make the required distinctions. The jury evidently understood its responsibility to consider the evidence against each defendant separately, since it acquitted Edna Coonan on some

counts.[5] See *United States* v. *Kabbaby*, 672 F.2d 857, 862 (11th Cir. 1982). In any event, a separate trial would not have helped Edna Coonan, since at any such trial the evidence of her husband's acts would have been admissible against her to establish the RICO conspiracy and the RICO enterprise.[6]

5. Petitioners James Coonan, Edna Coonan, McElroy, and Bokun contend (89-379 Pet. 56-62; 89-5601 Pet. 13-16; 89-5512 Pet. 27-36) that the district court erred in excluding expert testimony concerning the psychiatric condition of government witness Francis "Mickey" Featherstone.

Petitioners sought at trial to establish that Francis "Mickey" Featherstone, a government witness, was suffering from schizophrenia and for that reason was unworthy of belief. To that end, they sought to call Dr. Daniel Crane, a psychiatrist, to testify that someone suffering from paranoid schizophrenia can never be cured and is incapable of telling the truth. Observing that Featherstone had

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[5] Edna Coonan was acquitted of tax evasion and financing extortionate credit transactions. Gov't C.A. Br. 4.

[6] We do not understand the district court's comment (see 89-379 Pet. 54) that Edna Coonan "could not have been convicted in a trial by herself." The evidence against Edna Coonan was strong. It showed that from 1979 until 1984, while her husband was incarcerated, Edna Coonan regularly collected money from the Westies' middle-level loansharks; she occasionally complained about delinquent debtors who she suggested would be punished by her husband following his release from prison; she relied on the Westies' enforcers to assist her in the collection of the gang's loansharking money; she renewed at least one extension of credit to finance one of the gang's mid-level loansharks; in 1983 she relayed a message from her husband to Featherstone directing Featherstone to kill someone who had absconded with a lot of "shylock" money; and she directed Featherstone to put another Westies gang member out of the loansharking business or "do whatever you guys want with him" because that member was skimming loansharking money. See Gov't C.A. Br. 37-40.

seemed to be both competent and truthful, the district court nonetheless sought the advice of an impartial expert, Dr. Naomi Goldstein, before ruling on petitioners' motion. Dr. Goldstein reviewed Featherstone's medical history, his trial testimony, and the proposed testimony of Dr. Crane. She also interviewed Featherstone's counsel and one of the marshals who had charge of Featherstone, and she examined Featherstone himself. Dr. Goldstein found "no major psychiatric disturbance that would have so disturbed [Featherstone's] thinking that he was living in a fantasy world or suffering from a paranoid disorder, and no other mental disorder that would have interfered with intellectual function, concentration, memory and attention." Dr. Goldstein explained that nothing that a psychiatrist might tell a jury would clarify Featherstone's testimony, which seemed to have been "lucid and appropriate." Dr. Goldstein also took exception to Dr. Crane's proposed testimony, disagreeing with him on many points, "as well as with the extreme positions he takes, particularly without having examined Mr. Featherstone." Gov't C.A. Br. 110-111. Dr. Goldstein concluded (*id.* at 111):

> I have considerable concern about the psychiatric history and records as these require very careful interpretation before extrapolating from them. In my opinion differing opinions about these records and in the records themselves, might be very confusing and not add to what Mr. Featherstone has already reported about himself.

Based in large measure on Dr. Goldstein's report, the district court excluded Dr. Crane's testimony. *Ibid.*

During the cross-examination of Featherstone, which lasted for five days, defense counsel questioned Featherstone concerning his convictions, crimes, and bad acts; his abuse of cocaine and bouts with alcoholism; his prior lies and per-

juries; his animus toward some of the defendants and his attempts at revenge; his failed first marriage and his extramarital relationships; his alleged sexual perversions; his feelings of anger and rage; his agreement and disagreements with the government; his full psychiatric history, including the time he spent in mental hospitals; the medications administered to him; and the fact that he had once been diagnosed as suffering from "paranoid schizophrenia." Gov't C.A. Br. 112-113.

As this Court has recognized, a trial judge enjoys broad discretion in deciding whether to admit expert testimony (*Hamling* v. *United States*, 418 U.S. 87, 127 (1974)), and a trial court's determination that psychiatric testimony is not admissible to impeach the credibility of a witness will not be disturbed absent clear error. *United States* v. *Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976). In light of the court-appointed expert's detailed findings, the trial court acted well within its discretion in excluding Dr. Crane's testimony on the ground that his testimony would be more likely to confuse than assist the jury. See, *e.g.*, *United States* v. *Schmidt*, 711 F.2d 595, 598-599 (5th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); *United States* v. *Lord*, 711 F.2d 887, 892 (9th Cir. 1983).

Moreover, defense counsel was given extremely broad latitude in cross-examining Featherstone over a five-day period. Furthermore, the district court cautioned the jury to weigh Featherstone's credibility with special care, not only because Featherstone was an accomplice witness, but also because of his psychiatric history. Gov't C.A. Br. 112-113. In these circumstances, as the court of appeals concluded (Pet. App. 7a), the district judge "acted well within his discretion in refusing to admit the proffered testimony of * * * [Dr. Crane.]"

6. Petitioner Bokun claims (89-5512 Pet. 13-26) that the district court committed reversible error in restricting his direct examination of a defense witness.

On May 18, 1986, petitioner Bokun confessed to Sissy Featherstone, Mickey Featherstone's wife, that he had killed Michael Holly (whom the Westies blamed for the murder of Bokun's brother John). Bokun described how he had disguised himself; how he had shot Holly five times in the back; and how he had smiled at Holly's dying words. Bokun's admissions were secretly tape-recorded by Sissy Featherstone and admitted against Bokun at trial. Gov't C.A. Br. 19-20, 83-84.

In an attempt to cast doubt on the truthfulness of his own admissions, Bokun called Patrick Hogan as a witness. According to Bokun, Hogan would testify that Mickey Featherstone (who had been charged with the Holly murder) had told him to instruct Bokun to admit falsely that he had killed Holly, so that Sissy would have reason to hope for her husband's eventual release from jail. According to Bokun, Hogan would testify that he had relayed Featherstone's request to Bokun. The district court ruled that the Hogan-Bokun conversation was admissible, and that the government could elicit the Hogan-Featherstone conversation in order to place the former conversation in context. Pet. App. 8a-9a.

Thereafter, on direct examination, Hogan testified that he had had a conversation with Featherstone concerning Bokun, and that following the conversation he had spoken with Bokun (Gov't C.A. Br. 85; Pet. App. 9a):

> I met with Billy [Bokun], and I said to him, "Mickey [Featherstone] wants me to ask you to do him a favor." And I said he said, "Being that the cops are lying and all of this is going on, he is afraid of getting convicted, if this should happen, and he said that Sissy was a

> wreck," which she honestly was, and he said, "If this should happen, that he wants you to stand up and say you did it, and then he'll come out and he'll find out what really happened and he'll get you out."

On cross-examination, Hogan testified further about his conversation with Featherstone. In addition, Hogan testified that Featherstone consistently maintained his innocence of the Holly murder. Gov't C.A. Br. 85-86.[7]

Bokun argues that the district court should have allowed him to question Hogan in more detail about his conversation with Featherstone. According to petitioner, the limitation on direct examination prevented him from "elicit[ing] those portions of the conversation that demonstrated that Featherstone had told Hogan to ask Bokun *to lie* about killing Holly in order to calm Sissy Featherstone." 89-5512 Pet. 18.

That characterization of the court's limitation is inaccurate. The court permitted Hogan to testify about his conversation with Bokun. According to his testimony, Hogan told Bokun that Featherstone wanted Bokun to confess to Sissy Featherstone that it was he, not Featherstone, who had killed Holly. As the court of appeals explained (Pet. App. 9a), that testimony "clearly revealed the substance of what Featherstone wanted Bokun to do." There is no basis for Bokun's contention that the trial court precluded him from establishing the defense that his confession to Sissy Featherstone was false.

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[7] The evidence at trial showed that on the day of Holly's murder, Bokun, wearing an elaborate disguise, approached Holly on a crowded Manhattan street, fired five bullets into Holly's back, and escaped in a getaway car driven by Westie Kenneth Shannon. Bokun wore a hat, wig, and sunglasses, and had a faint mustache penciled in. Bokun wore heavy theatrical makeup to cover a prominent birthmark on his face. Gov't C.A. Br. 20.

7. Finally, Bokun contends (89-5512 Pet. 37-49) that he was denied his rights to counsel and to a fair trial when the district court appointed a substitute counsel to assist in his representation.

Two months into the trial, on November 30, 1987, Alfred Christiansen, counsel for petitioner Bokun, advised the court that he had an ear infection and would have to excuse himself to obtain medical attention. Government counsel assured the court that the proof would not implicate Bokun until the following week, and, with Bokun's consent, counsel for a co-defendant substituted for Mr. Christiansen. When Mr. Christiansen did not appear on December 7, as co-counsel predicted he would, the trial was adjourned until December 8 so that the government could reorder its proof in order to avoid implicating Bokun. Gov't C.A. Br. 93-94.

On December 14, the trial judge telephoned Christiansen and learned that he might be absent for another week or two. The judge then appointed attorney Austin Campriello to represent Bokun as co-counsel. The judge advanced the Christmas holiday break in order to give Campriello additional time to prepare. When trial resumed on December 21, the judge informed the jury that Christiansen was still too ill to proceed and introduced Campriello to the jurors. The government then called its next witness, an undercover detective who had dealt with Bokun. The following day, Campriello cross-examined the undercover officer thoroughly and at length. Trial was then adjourned until after the holidays. Gov't C.A. Br. 94-95.

On January 4, 1988, trial reconvened with Campriello as counsel for Bokun. The next day and frequently thereafter, both Campriello and Christiansen appeared jointly for Bokun. They alternated cross-examining the government's witnesses, objecting to the government's questioning, making legal arguments, and presenting Bokun's defense case.

Both attorneys participated in the charging conference, and Campriello delivered the defense summation. Gov't C.A. Br. 95.

Both attorneys represented Bokun at sentencing. Following the imposition of sentence, Christiansen advised the court that Bokun wished to be represented by Campriello on appeal. The court granted Christiansen's request to withdraw, but advised Bokun that if he decided to be represented by Campriello on appeal, he would have to forgo any challenge to his attorney's effectiveness. Bokun acknowledged the court's advice and reiterated his desire to be represented by Campriello. Gov't C.A. Br. 96.

Apparently recognizing (89-5512 Pet. 38) that Campriello was not ineffective under the standards set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984), petitioner nonetheless contends that there is a *per se* Sixth Amendment violation whenever counsel is substituted during a RICO trial. There is no merit to that claim. Absent "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," the Sixth Amendment guarantee of effective assistance of counsel is not implicated unless "some effect of [the] challenged conduct on the reliability of the trial process" is demonstrated in particularized fashion. *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). In the present case, no such effect can be shown. To the contrary, the trial court took great pains to ensure that the substitution of counsel did not prejudice petitioner. When petitioner's original counsel, Alfred Christiansen, became ill eight weeks into the trial, the court arranged, with petitioner's consent, for counsel for a co-defendant to represent petitioner during Christiansen's absence. The court took that step only after assuring itself that the proof would not implicate petitioner until the following week, when Christiansen was ex-

pected to return. Thereafter, the government rearranged its proof to avoid introducing any evidence that would implicate petitioner in Christiansen's absence. When it became apparent that Christiansen would be absent longer than originally anticipated, the court appointed Austin Campriello to represent petitioner as co-counsel, and the court advanced a holiday break in order to give Campriello time to prepare. Campriello reviewed the records in the case, familiarized himself with the trial proceedings to date, and announced that he was prepared to proceed. At no time did Campriello request any additional time in order to prepare for trial. There were only two days on which Campriello handled petitioner's representation by himself; after Christiansen reappeared at trial, he and Campriello frequently jointly appeared for petitioner. The record reflects, and the court of appeals specifically found (Pet. App. 11a), that Campriello represented petitioner effectively. Indeed, petitioner's decision to have Campriello represent him on appeal confirms that he regarded Campriello as an effective advocate for him.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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